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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
10

11 EDWARD YBARRA,

12 Petitioner,

13 vs.

14 M MARTEL, Warden,

15 Respondent.

CASE NO. 09cv1188-LAB (POR)

**ORDER DENYING MOTION TO  
PROCEED *IN FORMA PAUPERIS*  
ON APPEAL**

16 On February 11, 2011, the Court issued an order denying Petitioner Edward Ybarra's  
17 petition for writ of habeas corpus, explaining its reasons, and denying a certificate of  
18 appealability. Ybarra then, after obtaining an extension of time, filed a lengthy notice of  
19 appeal as well as a motion to proceed *in forma pauperis*.

20 The Court has reviewed the notice of appeal, which raises new issues, which  
21 contradicts the record, and which makes claims unsupported by federal law. The notice  
22 begins by claiming Ybarra was deprived of his right to cross-examine San Diego police at  
23 trial, and claims the admission of the testimony of an investigator at a preliminary hearing  
24 violated his Confrontation Clause rights. (Docket no. 46 at 11.) Ybarra's claim in his petition,  
25 which he also presented to the state court, was not that he was deprived of an opportunity  
26 to cross-examine witnesses, but that his counsel was ineffective for failing to subpoena and  
27 cross-examine them. His petition made no mention of the investigator's hearing testimony.  
28 These are therefore new claims, not exhausted in state court nor raised in his petition.

1 Ybarra then argues the Court violated his rights by allowing the jury to hear  
2 “prejudicial testimony of uncharged crimes under the 6th and 14th amend[ments.]” (Docket  
3 no. 46 at 12.) Apparently, he means the trial court violated his rights by admitting evidence  
4 of a 911 call in which Ybarra’s victim said she was afraid because (she thought) he had  
5 committed murder before. The Court addressed this in its order denying the petition, and  
6 concluded the matter was not debatable among reasonable jurists. That conclusion still  
7 stands.

8 Ybarra then argues the Court should have held an evidentiary hearing “to flesh out  
9 the truth of the court record.” (Docket no. 46 at 12.) Specifically, he now says he wanted  
10 the Court to listen to the 911 tape he thought was prejudicial, and to call police officers to  
11 testify. His motion for an evidentiary hearing (Docket no. 27) asked the Court to conduct a  
12 hearing and consider all the evidence again, though he didn’t explain what it would show.  
13 He mentioned the 911 tapes only in passing (*id.* at 1:23–25, 7:23–28), in an effort to raise  
14 a Sixth Amendment claim. He also mentioned alleged perjury by the District Attorney. (*Id.*  
15 at 8:24–9:5.) He did not specifically request the testimony of San Diego police, nor did he  
16 explain why it would be necessary. Assuming, however, the motion for an evidentiary  
17 hearing had adequately explained why the 911 tape and police testimony ought to be  
18 presented at a hearing, the motion would still have been denied. The admission of the 911  
19 tape to establish an element of the crime (that Ybarra’s stalking victim was afraid) did not  
20 violate any clearly established federal constitutional right. (See Docket no. 41 at 5:3–5 and  
21 n.3, 6:26–7:14) The testimony of police officers who responded to the 911 call would not  
22 have had any significant effect on the outcome of the case, and Ybarra’s trial counsel was  
23 not deficient for failing to call them. (*Id.* at 5:3–5, 7:16–8:25.) Calling the police officers also  
24 would not show that prosecutors knew Ybarra’s victim’s testimony was in part perjurious.<sup>1</sup>  
25 Other reasons for denying the motion are set forth in the report and recommendation, which

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27 <sup>1</sup> Although Ybarra’s petition pointed to what he thought was a conflict in the testimony  
28 between police and his victim, the state court, examining the testimony, concluded  
prosecutors offered an explanation for the conflict. (See Docket no. 1-1 at 17–18 (state  
superior court’s discussion of testimony on habeas review).) This conclusion is fairly  
supported by the record.

1 the Court adopted in its order denying the petition. (Docket no. 14:16–15:18.) The Court’s  
2 earlier conclusion that this issue would not be debatable by jurists of reason still stands.

3 Ybarra then raises the issue of the 911 tape (or tapes) again. (Docket no. 46 at 13.)  
4 For reasons already discussed, this claim fails and is not debatable by jurists of reason.

5 Ybarra next asks whether the Court violated his purported due process right to have  
6 the Court “review the entire record on appeal and trial record as a whole.” Assuming he  
7 means the Court should not have given any deference to a summary state court denial of  
8 habeas relief—an argument he raised in his objections to the report and  
9 recommendation—his claim is foreclosed by *Harrington v. Richter*, 131 S.Ct. 770, 784  
10 (2011). He may also be objecting to the procedure by which a report and recommendation  
11 is issued, objections are received, and any finding or recommendation specifically objected  
12 to is reviewed *de novo*. If his objection is that the Court should have reviewed the entire  
13 record *de novo* even in the absence of a specific objection to the report and  
14 recommendation, he is in error. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir.  
15 2003) (“[T]he district judge must review the magistrate judge’s findings and  
16 recommendations *de novo if objection is made*, but not otherwise.”) If he means something  
17 else, it is a new claim he has not raised before. See *United States v. Robertson*, 52 F.3d  
18 789, 791 (9th Cir. 1994) (“Issues not presented to the district court cannot generally be  
19 raised for the first time on appeal.”)

20 After this, Ybarra re-raises charges of perjury, and contends that immateriality of his  
21 victim’s alleged perjury is beside the point. (Docket no. 46 at 14.) Ybarra’s claim was that  
22 prosecutors committed misconduct by offering what they knew to be perjured testimony.  
23 The allegedly perjured testimony pertained to whether Ybarra’s victim had reason to fear him  
24 based on what police told her, her state of mind being an element of the crime. As  
25 discussed in the order denying the petition, even if Ybarra could show prosecutors knew his  
26 victim committed perjury when testifying about whether police officers mentioned Ybarra’s  
27 criminal record (which he can’t), there is no likelihood the testimony he now challenges made  
28 any difference to the outcome. The evidence he challenges was at best marginal, and in

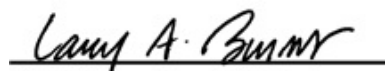
1 addition the evidence showing his victim was afraid was overwhelming. Among other things,  
2 Ybarra had already violently struck his victim, verbally abused her, broken her windows,  
3 burned her bedding, come to her home and refused to leave, and threatened several times  
4 to kill her and those she was with. She had twice called 911 when Ybarra was menacing her.  
5 The victim had also been warned by Ybarra's mother to hide and stay inside her home,  
6 because Ybarra was on drugs, had a bat, and intended to kill the victim.

7       Apparently Ybarra is now conceding it was not prejudicial but is arguing the use of  
8 perjured testimony requires reversal of a conviction. This is not the law, however. *United*  
9 *States v. Bagley*, 473 U.S. 667, 679–80 (1985) (noting well-established rule that a conviction  
10 obtained by means of the knowing use of perjury must be set aside if there is “any  
11 reasonable likelihood” the perjured testimony led to the guilty verdict).

12       For these reasons, and for reasons set forth in the Court's earlier orders, the Court  
13 **CERTIFIES** that the appeal would not be taken in good faith. Ybarra's motion to proceed  
14 *in forma pauperis* on appeal is therefore **DENIED**. See Fed. R. App. P. 24(a)(3)(A) and  
15 24(a)(4)(B).

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17 **IT IS SO ORDERED.**

18 DATED: December 12, 2011

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20 **HONORABLE LARRY ALAN BURNS**  
21 United States District Judge  
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